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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 432

FRANK PALUMBO, *Petitioner,*

v.

HONORABLE J. CULLEN GANEY, Judge of the United States District Court for the Eastern District of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Frank Palumbo, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 5, 1951.

OPINIONS BELOW

No opinions were written below.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1951 (R. 11). The jurisdiction of this Court

is invoked under the provisions of 28 U. S. C. (Supp. IV) 1254(1).

QUESTIONS PRESENTED

1. Whether a witness who has once appeared voluntarily before the Grand Jury, without subpoena, and who thereafter refuses to return when directed by a Special Assistant to the Attorney General of the United States to do so, and is not thereafter subpoenaed, may be attached for a criminal contempt for thus not returning to testify.

2. Whether, in the circumstances of this case, after it appears without contradiction that the witness was never subpoenaed, but the district judge none the less refuses to dismiss the proceeding for attachment for criminal contempt, mandamus is available to vacate the order of attachment.

CONSTITUTIONAL PROVISION, STATUTES, AND RULE OF COURT INVOLVED

1. The Fifth Amendment provides, in pertinent part, that—

> No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *

2. 18 U. S. C. (Supp. IV) 401 provides:

> § 401. **Power of court**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

3. Rule 17(g) of the Federal Rules of Criminal Procedure provides as follows:

> (g) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

STATEMENT

On April 9, 1951, Frank Palumbo, the petitioner herein, testified before a Grand Jury empanelled in the Eastern District of Pennsylvania to investigate violations of federal statutes (R. 1, 3). He had appeared without a subpoena, and after testifying he was released "until such time as he would be notified by telephone to reappear before the said Grand Jury" (R. 3).

Thereafter, in October 1951, the petitioner was notified by one Morris, who appears to have been an assistant to Special Assistant to the Attorney General Vincent P. Russo, that his presence before the Grand Jury would be again required on October 9 (R. 4). On that day, petitioner advised Morris by telephone of his inability to appear, because of a business engagement out of town (R. 6), whereupon, his call being transferred to Mr. Russo, petitioner agreed to be present at the Grand Jury's next session on October 16 (R. 7). On October 16, petitioner did not appear (R. 4, 7), and the Chief Deputy Marshal for the District was unable to locate him (R. 8-9).

At no time was a subpoena requiring petitioner's attendance before the Grand Jury ever served upon him.

On October 19, Special Assistant to the Attorney General Max H. Goldschein filed in the district court a petition setting forth the following facts, which charged that petitioner "wilfully, deliberately and contumaciously fails and refuses to reappear before the Grand Jury as ordered", i. e., as ordered by Mr. Russo, and which prayed that the district court issue an order "to attach the body of the

aforesaid Frank Palumbo, * * * and to bring him into this Honorable Court for the purpose of having him appear and answer to a charge of Criminal Contempt" (R. 5). Nowhere in the Petition for Attachment or in any of the affidavits attached thereto is there any allegation or even suggestion that petitioner was ever served with a subpoena, either in April or October.

The respondent, Judge Ganey, thereupon issued an order of attachment conformably to the prayer of the petition, "for the purpose of having [Palumbo] appear and answer to a charge of criminal contempt" (R. 1, 9).

A motion to dismiss the attachment (R. 10) was denied on October 29, 1951 (R. 2), whereupon petitioner, reciting the foregoing circumstances in detail, sought a writ of mandamus in the court below to direct the respondent "to vacate and expunge the Order of the Court ordering the United States Marshal to attach the body of Frank Palumbo" (R. 1-3).

The Court of Appeals denied the petition for mandamus, without opinion, a week after it was filed (R. 11).

REASONS FOR GRANTING THE WRIT

I. But for the respondent's ruling in this case, we should have considered too clear for argument the proposition that the prerequisite for an attachment for contempt was the issuance and service of a valid subpoena. As early as 1795, in the predecessor of the trial court here, it was ruled that an attachment could only issue in a case where the subpoena has been actually served. *United States* v. *Caldwell*, 2 Dall. 333 (C. C. D. Pa.) (Paterson, Circuit Justice, and Peters, District Judge). Such intervening federal cases as there are lay down the same rule, *viz.*, no attachment in the absence of a subpoena, validly served. *In re Attachment of Spencer*, MacA. & M. (11 D. C.) 433; *Samples* v. *United States*, 121 F. 2d 263, 266 (C. C. A. 5), certiorari denied, 314 U. S. 662. Even the witness's indorsement of "Accepted" on a subpoena duly issued will not authorize an

attachment against him. *Dreskill* v. *Parish,* 5 McLean 213, Fed. Case No. 4075 (McLean, Circuit Justice). Similarly, Rule 17(g), F. R. Crim. P. (*supra,* p. 3), presupposes disobedience of "a subpoena served upon him" and Form 22, F. R. Crim. P., 327 U. S. at 890, "Warrant for Arrest of Witness," recites that "he wilfully failed to appear after having been served with subpoena * * *."[1] Here the petition for attachment is at some pains to avoid any reference to the service of a subpoena.

Disobedience of the lawful "order * * * or command" of a court is, to be sure, punishable as a contempt under 18 U. S. C. (Supp. IV) 401(3), *supra,* p. 2, but here no order of the court is alleged or shown. Neither the respondent nor any other judge directed petitioner to return to testify before the Grand Jury or to appear there. Since no order of the court is involved, there can of course be no disobedience thereof. *Berry* v. *Midtown Service Corp.,* 104 F. 2d 107 (C. C. A. 2); *Morgan* v. *United States,* 95 F. 2d 830 (C. C. A. 8).

The only instance in which disobedience of a prosecutor's order might have exposed a witness to punishment was under former R. S. 877, 28 U. S. C. (1946 ed.) 655, which provided that witnesses for the Government "shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; * * * " See *Blackmer* v. *United States,* 284 U. S. 421, 433; *In re Attachment of Spencer, supra.* But R. S. 877 was repealed in the revision of the Judicial Code, see Sec. 39 of the Act of June 25, 1948, 62 Stat. at 992, and the clause, "not to depart without leave of the court or district attorney," does not now appear in crim-

[1] Since the attachment here recites on its face that it is "for the purpose of having him appear and answer to a charge of criminal contempt" (R. 9), it is not necessary to inquire into the wholly different power to attach in order to require the witness's attendance to testify. See *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 612-613, pointing out that the arrest there considered was not one for contempt.

inal subpoenas. See Form 20, F. R. Crim. P., 327 U. S. at 889. But it is not necessary to inquire whether the repeal of R. S. 877 and the changed form of subpoena would permit a duly subpoenaed witness to depart with impunity in the absence of leave granted by the prosecutor, for here the petitioner was never subpoenaed. No subpoena was ever served, and the petition for attachment pointedly fails to allege that one was ever issued.

II. "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * As extraordinary remedies, they are reserved for really extraordinary causes." *Ex parte Fahey,* 332 U. S. 258, 259-260. The power of this Court to issue the writ of mandamus directly to a district court "will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken." *Ex parte United States,* 287 U. S. 241, 248-249. Since, however, the present case deals with the issuance of a writ of mandamus by a court of appeals, the questions which divided this Court in *Ex parte Peru,* 318 U. S. 578, do not arise, and the primary issue here is whether the circumstances presented are sufficiently unusual to call for the admittedly extraordinary remedy of mandamus directed to a judicial officer.

We think that they are. Even though the proposition that no attachment can issue for failure to obey a prosecutor's order in the absence of a subpoena duly served is so clearly settled that, even in the event of conviction, petitioner is certain to be freed on appeal (or, if need be, on certiorari here), we think that this record still demonstrates the need for extraordinary intervention, on at least two grounds.

First. The present contempt proceedings are on their face so utterly devoid of any basis in law that it is literally outrageous that any individual should even have to stand trial on the charge made against this petitioner, viz., disobedience of a prosecutor's order. While in a technical sense there was probably jurisdiction to proceed, the notion

that disobedience of a prosecutor's order involves a contempt of court is so utterly far-fetched that no person should be required to give bail, stand trial, and take an appeal before he is free of the restraints, actual or potential, to which the present charge subjects him. The facts being substantially undisputed, there is moreover little likelihood that the respondent will change his views of the law. This would necessitate an appeal, with its attendant expense and delay.

We submit that the interest in freedom from a charge of criminal contempt for failure to obey a prosecutor's order is at least as much entitled to immediate judicial protection as the right to a jury trial in a civil cause. Mandamus is of course available to protect a litigant whose action for breach of contract was erroneously transferred to the equity side of the court. See *In re Simons*, 247 U. S. 231, 239, where this Court, *per* Holmes, J., said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake."

And the court below has granted mandamus within the last few months to compel a jury trial on the issues of damages, on the view that "Appeal, after an abortive trial to the court, would be a clearly inadequate remedy." *Canister Co.* v. *Leahy*, 191 F. 2d 255, 257 (C. A. 3), pending on certiorari, No. 402, this Term, filed October 27, 1951. We submit that appeal after a trial in the present situation would be an equally inadequate remedy, particularly where, as here, the individual's liberty is at stake. And the difference in the attitude of the court below in saving a corporate defendant a trial on the issue of damages, holding mandamus to be available, and in not saving an individual defendant a trial on the issue of whether he is in contempt for disobedience of a prosecutor's order to appear to tes-

tify without service of a subpoena, holding mandamus to be unavailable, assuredly presents grounds for review by this Court.

Second. The present case unfortunately does not reflect an isolated instance of aberration in the heat of litigation. It is much more serious than that. It is simply the latest manifestation of a consistent lawlessness in a single phase of law enforcement arising out of the same Grand Jury investigation under the direction of the same prosecutor. Other instances of that official's disregard of legal rules have already been brought here and redressed by this Court. See *Hoffman* v. *United States*, 341 U. S. 479, reversing 185 F. 2d 617 (C. A. 3) (criminal contempt proceeding against witness who invoked his privilege against self-incrimination); *Greenberg* v. *United States*, 341 U. S. 944, vacating 187 F. 2d 37 (C. A. 3) (same);[2] *Palermo* v. *Ganey*, 340 U. S. 923 (allegedly improper subpoena; case rendered moot through issuance of proper subpoena after filing of petition for certiorari in this Court). The present case, which involves the attempt to punish as for a criminal contempt a witness who was never subpoenaed, for disobedience of the order of a prosecutor, not of a court, is the latest in the series.

It is of course settled that mandamus is properly invoked where there has been a settled and consistent disregard of a particular Rule prescribed by this Court. *McCullough* v. *Cosgrave*, 309 U. S. 634; cf. *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U. S. 701. We submit that mandamus is likewise an appropriate remedy where there is a persistent disregard of the Rules generally, and that accordingly the writ should have been issued, by way of summary and prophylactic remedy, to halt the abuses already reflected by the other litigated phases of the same Grand Jury investigation under the direction of the same prosecutor.

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[2] The *Greenberg* case was remanded for reconsideration in the light of the subsequently announced *Hoffman* decision, and was reargued in the court below on October 15, 1951.

III. It may be that the real reason underlying the petition for attachment herein was a desire to insure petitioner's appearance to the end that he might then be served with a subpoena. But even on the face of the present record, without more, this is an instance of an individual under attachment and required to give bail (R. 9) and face trial on a charge of criminal contempt, the contempt consisting of his failure or refusal to obey the order of a prosecutor to appear and testify, without ever having been properly subpoenaed.

We think that the record itself presents so flagrant a departure from accepted rules of criminal procedure as to call for the most drastic and extraordinary judicial remedy. We think that a writ of mandamus should have been issued by the court below to halt at the threshold the perversion of process disclosed by the papers before it. And we think that this Court should now review the entire proceeding to declare in unmistakable terms that in our system prosecution and adjudication are not yet so inextricably intertwined that disobedience of a prosecutor has become punishable as a contempt of the court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 432

FRANK PALUMBO, PETITIONER

v.

HONORABLE J. CULLEN GANEY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinions were written below.

JURISDICTION

The order of the Court of Appeals was entered on November 5, 1951 (R. 11). The petition for a writ of certiorari was filed on November 16, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals was justified in refusing to issue a writ of mandamus directing the District Court to vacate an order for attachment of petitioner.

STATUTES AND RULE INVOLVED

18 U.S.C. (Supp. IV) 401:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

28 U.S.C. (Supp. IV) 1825:

* * * * *

> Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

Rule 17, F. R. Crim. P.:

* * * * *

> (d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less

than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law.

* * * * *

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

STATEMENT

The printed record in this case consists of the petition for mandamus (R. 1-3) and the exhibits which petitioner's counsel attached thereto, consisting of the original petition for attachment and exhibits (R. 3-9), the order of attachment dated October 19, 1951 (R. 9), and the motions to dismiss (R. 10). Petitioner's counsel in the court below failed to inform that court that there had been other proceedings in connection with the order of attachment and that an amendment of the petition for attachment, with supporting exhibits, was allowed by the District Court on October 29, 1951. We have accordingly filed with the Clerk of this Court a certified copy of the complete record which includes, in addition to the matters printed in the record, the following documents:

Record of proceedings of October 22, 1951.
Amended petition for attachment, including affidavit "D", Exhibit 1 to affidavit "D", and Exhibit "E".
Order allowing amendment.
Record of proceedings of October 29, 1951.

The facts as stated in the petition for a writ of certiorari are incomplete for the reason that the Transcript of Record is incomplete. The full record may be summarized as follows:

A subpoena was issued on April 9, 1951, commanding petitioner to appear before a grand jury investigating violations of federal statutes. (Exhibit 1 to affidavit "D".) On the same day petitioner was notified by telephone of the subpoena; he presented himself to James T. Gallagher, a special investigator for the Alcohol Tax Unit (Affidavit "D"). Apparently petitioner stated that it would be unnecessary to serve him; he was ready to appear and did not want the $4 a day (see argument in record of proceedings, October 22, 1951, p. 4). Gallagher noted on the subpoena that petitioner did not accept it (Exhibit 1 to affidavit "D"). That same date petitioner appeared before the grand jury and testified. At about 5:00 p.m. he was advised that the grand jury could not complete its questions on that date, and that he would be recalled. He agreed to reappear at any time (R. 7; Exhibit "E").

On October 8, 1951, he was advised by telephone

by one Owen M. Morris "that the Grand Jury wanted him to reappear on October 9, 1951 at 10:00 A.M." Petitioner did not appear at the time fixed on October 9, but instead telephoned Morris that he had to leave the city. Morris transferred petitioner's call to Vincent P. Russo, a Special Assistant to the Attorney General. (R. 6.) Mr. Russo advised petitioner "that his appearance before the Grand Jury was needed immediately and directed him to report that afternoon no later than two o'clock." Petitioner stated that he could not appear at that time, but expressed a willingness to appear on the following Monday, October 15. Upon being advised that the grand jury would not be in session on Monday and that, although he was not excused from appearing on October 9, "the Grand Jury wanted him to report without fail on Tuesday, October 16, 1951, at 10 o'clock A.M.", petitioner agreed to be present at that time. Petitioner did not appear at that time or thereafter. (R. 7.)

On October 19, a petition for the attachment of the body of petitioner was filed, stating that it was deemed "material, important and essential" that petitioner "reappear before the said Grand Jury as a witness and to give further testimony." The petition also charged that his conduct was obstructing and impeding the work of the grand jury. It concluded by requesting that petitioner be brought into court for the purpose of "having

him appear and answer to a charge of Criminal Contempt." (R. 3-5.)

Judge Ganey, the respondent, issued an order of attachment for the purposes requested (R. 9). Petitioner then moved to dismiss the petition for attachment and the order of attachment (R. 10). Hearings on the motion were held on October 22 and 29, 1951. On the latter date amendment of the petition for attachment was allowed (Record of proceedings of October 29, 1951). The court denied the motion to dismiss (R. 2).

Petitioner then commenced the present proceeding in the Court of Appeals for a writ of mandamus to vacate the order of attachment (R. 1-3). The petition for a writ of mandamus was denied on November 5, 1951 (R. 11). On November 16, the Court of Appeals denied an application for a stay of proceedings. An application for stay of proceedings addressed to Mr. Justice Burton was denied on December 3, 1951.

ARGUMENT

The Court of Appeals was justified in denying petitioner's application for a writ of mandamus, for this is clearly not an appropriate case for the exercise of that power. Petitioner has not been formally cited for contempt in accordance with Rule 42(b). All that has happened is that an order of attachment has been issued to bring petitioner before the court.

Petitioner's argument is founded on the premise

that he is being brought before the court solely for the purpose of answering contempt charges to which he claims he is not amenable. It is not at all clear that such is the case. The order of attachment was seemingly issued for the dual purpose of making petitioner available as a witness and for contempt proceedings. The petition for attachment (incorporated in the order of attachment) recites that it was essential that petitioner reappear as a witness (R. 4); it also recites that he was obstructing the grand jury (R. 5). The attachment was ordered that he might "appear and answer to a charge of criminal contempt." (R. 9.) It would thus seem that the appearance of petitioner before the grand jury as well as his answer to contempt charges are sought to be effected by the order of attachment. It was clearly appropriate to issue an order of attachment to secure the production of petitioner as a witness. A court "undoubtedly * * * has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 616.[1]

But even assuming that the order of attachment was issued solely for the purpose of initiating

[1] We have just been advised that efforts to apprehend petitioner under the order of attachment were successful and that on December 7, after Mr. Justice Burton denied a stay, petitioner surrendered. In this aspect, therefore, the case is moot.

contempt proceedings, we submit that there is no reason for the issuance of the extraordinary writ of mandamus.[2] Petitioner concedes that the District Court had "jurisdiction to proceed," at least "in a technical sense" (Pet. 6). He argues merely that he is certain that the District Court will eventually decide the case in a manner he considers to be wrong. That is not a proper ground for mandamus.

This Court has consistently refused to permit the use of mandamus as a means of avoiding orderly appellate review. An "appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30.[3]

In his petition for a writ of certiorari, petitioner argues two grounds for exercise of the mandamus discretion: inconvenience (Pet. 7); and "consistent

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[2] Although mandamus is classified as a legal remedy, its issuance is largely controlled by equitable principles. Petitioner comes into court with unclean hands. He was released after a promise to reappear before the grand jury in response to a telephone call. His failure to keep that promise was the reason for the order of attachment. We suggest that the refusal of the Court of Appeals to exercise its mandamus discretion was justifiable on that ground alone. *United States ex rel. Turner* v. *Fisher*, 222 U.S. 204, 209; *Laycock* v. *Hidalgo County Water C. and I. Dist. No. 12*, 142 F. 2d 789, 791 (C.A. 5), certiorari denied, 323 U.S. 731.

[3] Certainly the denial of the motion to dismiss the attachment was not an appealable order. Cf. *Cobbledick* v. *United States*, 309 U.S. 323.

lawlessness in a single phase of law enforcement arising out of the same Grand Jury investigation under the direction of the same prosecutor" (Pet. 8).

This Court has consistently rejected the argument of inconvenience at being forced to trial as a ground for mandamus, even where jurisdictional questions are raised. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 31, and cases cited. Certainly inconvenience is not a factor where jurisdiction to proceed is conceded. The fact that in petitioner's opinion there is "little likelihood that the respondent will change his views of the law" (Pet. 7) and that therefore an appeal may be necessary if a trial takes place is irrelevant. Petitioner is not entitled to an appeal before trial, merely because he believes the trial court has an erroneous view of the law.

It is certainly not clear that petitioner cannot properly be punished for contempt on the basis of the facts. A subpoena was issued. The process server noted on the subpoena that petitioner "appeared in response to telephone call. Did not accept subpoena." On the basis of this record, where there has been no trial and no evidence taken, it cannot be concluded as a matter of law that there was no service. Service cannot be avoided simply by refusal to accept a subpoena. *In re Ball*, 2 Cal. App. 2d 578, 579 (1934); *Gallun* v. *Hibernia Bank & Trust Co.*, 182 Wis. 40, 44 (1923).

In any event, petitioner thereafter appeared before the grand jury. *Supra*, p. 4. A witness who appears pursuant to a subpoena waives any technical defects in the subpoena. See *In re Meckley*, 50 F. Supp. 274, 275 (M.D. Pa), affirmed, 137 F. 2d 310 (C.A. 3), certiorari denied, 320 U.S. 760. In the same way, petitioner may be deemed to have waived any defect in the manner of service. *In re Hall*, 296 Fed. 780, 782 (S.D. N.Y.), dismissed, 2 F. 2d 1016. Moreover, a person who submits an answer to a complaint without having been served with a summons is thereafter before the court to the same extent as if he had been summoned. In the same manner, we submit, a person who appears knowing that a subpoena has been issued for him can be considered to have submitted himself to the authority of the grand jury to the same extent as if he had accepted service. Having agreed to submit himself to the authority of the grand jury, he may properly be held to be subject to that authority until his testimony is completed. Cf. *Lobel* v. *Cossey*, 157 Fed. 664, 666 (C.A. 2), where it was held that a witness who appeared voluntarily for direct examination was properly held in contempt for failure to appear for cross-examination on a subsequent day. See also *Burnham* v. *Morrissey*, 80 Mass. 226, 240 (1859); *Feree* v. *Strome*, 1 Yeates 303 (Pa. 1793); *Johnson* v. *Williston*, 7 N.B. 171, 176 (1851). It cannot be doubted that a witness testifying under the same circumstances who was directed to reappear after a five-minute recess could be held in con-

tempt if he failed to reappear. A witness who, before being released, is told that he will be recalled, and who then agrees to reappear in response to a telephone call, is in essentially the same position. See 18 U.S.C. 401(1), (3). His refusal to reappear is wilful disobedience.

It is unnecessary to discuss these questions further at this point. It is sufficient to note that petitioner's basic assumption that he cannot possibly be lawfully convicted of contempt on the admitted facts is unfounded. The question of service should be tried before the District Court. The other questions are matters to be briefed and argued in the District Court. They are not questions to be summarily foreclosed by the extraordinary writ of mandamus.[4]

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[4] Petitioner's aspersions on the District Court and prosecutor are unfounded. None of the cases he cites involve the point which would be at issue on a trial for contempt. The fact that a court has been overruled on appeal in another matter hardly shows flagrant misconduct.

CONCLUSION

The court below clearly acted within its discretion in refusing the writ of mandamus. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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Assistant Attorney General.

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REX A. COLLINGS, JR.,
Attorneys.

DECEMBER 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 879551 827

DEC 28 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 432

FRANK PALUMBO, *Petitioner,*

v.

HONORABLE J. CULLEN GANEY, Judge of the United States District Court for the Eastern District of Pennsylvania.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY MEMORANDUM.

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PETITIONER'S REPLY MEMORANDUM.

I. Respondent's Brief in Opposition sets forth additional matters occurring after the petition for mandamus was filed in the court below, but fails to point out that the written amendment to the petition for attachment was not filed in the District Court until October 30, see file indorsement under caption, a day *after* the petition for mandamus had

been filed in the Court of Appeals. Nor does respondent advise this Court that the supplemental papers listed in his Brief in Opposition (p. 4) were not served on counsel for the petitioner until nearly a month later, after the present petition for certiorari was filed, and after application for a stay had been made to the Circuit Justice. See Appendix A hereto, *infra*, p. 6. Apparently the prosecutor in this case is as averse to serving copies of pleadings as he is to serving subpoenas.

II. Respondent's argument on the merits rests on two bases, both demonstrably untenable.

a. He urges (Br. Op. 6-7) that it is not at all clear that petitioner was brought before the court solely for the purpose of answering contempt charges, and that "It was clearly appropriate to issue an order of attachment to secure the production of petitioner as a witness." The infirmities of this contention are obvious. First, the petition for attachment specifically prays an attachment "for the purpose of having him appear and answer to a charge of Criminal Contempt" (R. 5), and the order of attachment repeats these identical words (R. 9). It is clear from the tenor of everything in the record that petitioner was proceeded against for a contempt for not appearing, in supposed reliance on Rule 17(g), F. R. Crim. P., and that the proceeding was not one to compel his appearance under Rule 46(b). Respondent's Brief reflects the same confusion between the power to compel appearance and the power to punish for contempt that led to the Third Circuit's reversal in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 612-613. It is therefore hardly necessary to add that the present contention reflects the usual disabilities common to afterthoughts.

b. Respondent also urges (Br. Op. 9) that "It is certainly not clear that petitioner cannot properly be punished for contempt on the basis of the facts." But the arguments under this heading are "spiders' webs inadequate to con-

trol the dominant facts," Holmes, J., in *Myers* v. *United States*, 272 U. S. 52, 177, the dominant facts being that petitioner was never served, that Gallagher never tendered any subpoena although he sat talking with petitioner for an hour (Affidavit "D"), that petitioner did not in any sense prevent service, and that the only contempt set out in Rule 17(g) consists of failure "to obey a subpoena *served* upon him." It is simply impossible to make a contempt out of the present facts as long as Rule 17(g) remains in force.[1] Nor can respondent spell an 18 U. S. C. 401 contempt out of the present facts (Br. Op. 10-11) for, as we stressed before (Pet. 3), no order of a court is involved.

III. If the petition for certiorari is granted, petitioner also expects to argue that a subpoena issued in April commanding him to appear "Forthwith" (Exh. 1 to Affidavit "D") does not subject him to punishment for contempt for not appearing in October, in view of the repeal of R. S. 877, and the terms of Criminal Form No. 20, 327 U. S. 889. See Pet. 5-6.

IV. Respondent's Brief in Opposition and the additional documents therein listed (p. 4) reflect two additional reasons why mandamus is appropriate in the present circumstances.

a. Since the Government now defends the proceedings on the merits, it is clear that what we called "the latest manifestation of a consistent lawlessness in a single phase of law enforcement arising out of the same Grand Jury investigation under the direction of the same prosecutor" (Pet. 8) has now been adopted and ratified under a claim of right. It is the Department of Justice, not simply its representative, that now contends that a subpoena unserved is equivalent to a subpoena served, and which now adds the contention that a proceeding brought to attach an individual so that he can be punished for contempt is equivalent to and should be treated as an attachment to compel his attend-

[1] *In re Meckley*, 50 F. Supp. 274, and again in *Lobel* v. *Cossey*, 157 Fed. 664, cited by respondent (Br. Op. 10), there had been actual service of the subpoenas involved. 50 F. Supp. at 275; 157 Fed. at 665 (witness had "been duly summoned").

ance, quite apart from any contempt. It may be expected, therefore, that the practices disclosed by the present record will spread. Since questions of subpoenas and attachments arise primarily in district courts, and since many orders connected therewith are not appealable, the integrity of criminal procedure requires that, once a practice such as the present one comes to light, it be condemned forthwith. On our view of the law, the issuance of a mandamus could not possibly result in piecemeal appeals; the relief sought would effectually terminate the entire proceeding.

b. Moreover, it appears from the proceedings of October 22 and 29 (Br. Op. 4) that a new subpoena was issued for petitioner in October, and that the present contempt proceedings were commenced only when the second subpoena could not be served. Thus the process of contempt is here being used to satisfy a prosecutor's pique.

It also appears from the cited proceedings that the respondent considers petitioner's conduct to constitute a contempt. We said before (Pet. 7) that "there is * * * little likelihood that the respondent will change his views of the law"; and we could add that, in view of the Brief in Opposition, there is now no such likelihood whatever. Petitioner will therefore be convicted of contempt, and under respondent's practice, held in high bail while appealing his conviction. See *Hoffman* v. *United States*, No. 513, Oct. T. 1950, R. 1, 20 ($10,000 bail for criminal contempt, refusal to answer question); *Greenberg* v. *United States*, No. 586, Oct. T. 1950, R. 71a (same); s. c., No. 461, this Term.

We have, therefore, a case where an individual is held in $1000 bail (R. 9; Br. Op. 7, n. 1) in total disregard of the plain language of Rule 17(g) that only disobedience of a "subpoena *served* upon him" constitutes a contempt. The case is not moot, as petitioner is in further jeopardy of $10,000 bail. And the Government's law enforcement agency defends in this Court the tactics which are spread at large on the present record, thus opening the door to similar nullification of the Rules in other proceedings. Accord-

ingly, we submit, there is presented such a "really extraordinary cause" as will justify mandamus, and one which imperatively calls for review by this Court.

Respectfully submitted.

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Counsel for the Petitioner.

DECEMBER 1951.

[For Appendix A, see overleaf.]

APPENDIX A.

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Eastern District of Pennsylvania
Fourth Floor, U. S. Courthouse
Ninth and Market Streets
Philadelphia 7, Pa.

November 26, 1951

Jacob Kossman, Esquire
Commercial Trust Building
Philadelphia, Penna.

In re: FRANK PALUMBO

Dear Mr. Kossman:

Pursuant to the application of Max H. Goldschein, Special Assistant to the Attorney General, and the Order of Court entered on October 30, 1951, the United States filed an Amended Petition, together with the supplemental affidavits of Max H. Goldschein and James J. Gallagher in the above entitled case.

Through an inadvertence, I failed to mail you copies of the documents that were filed.

A complete set of the aforesaid documents are enclosed herewith. Please accept my apologies.

Sincerely yours,

(Signed) VINCENT P. RUSSO
VINCENT P. RUSSO,
Special Assistant to the Attorney General.

Enclosures